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No. 99-1967

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH FRANCOLINO, et al.,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New York Appellate Division, First Department

MOTION BY NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI WITH BRIEF ATTACHED

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

The National Association of Criminal Defense Lawyers and its New York affiliate, the New York State Association of Criminal Defense Lawyers, hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the New York Supreme Court, Appellate Division, First Department. Petitioners have consented to the filing of this brief, but Respondents have declined to consent to this brief being filed. A copy of the proposed *amici* brief is attached.

As noted in the Statement of Interest of the *Amici*, the issue presented in this case is of great importance to the criminal justice system. There is nothing more important in a criminal trial than having a fair adjudicator when essential issues of life and liberty are at stake. The parties and the public at large must believe that a criminal case is being presided over by a judge who is fair and was selected in an impartial manner. To have one party select the judge undermines the public's confidence in the fairness of the entire procedure.

In addition, the question arises as to the proper Constitutional test to be applied when a judge is selected by one party: in such a situation, is the fairness of the trial so compromised that this Court's "structural error" analysis must apply? Or is some form of "harmless error" rule appropriate?

These questions are vital to the operation of the criminal justice system. *Amici* and its members, some 10,000 attorneys working throughout the nation in the

criminal justice system, are vitally concerned about these questions, which they frequently confront. For these reasons, *Amici* request that the Court grant leave to file the attached brief in support of the Petition for Certiorari.

Respectfully submitted,

Dated: New York, N.,Y,
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BRIEF OF AMICI NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief *amici curiae* is submitted in support of the Petition for Certiorari filed by Petitioners Joseph Francolino, Afonso Malangone, Duffy Waste and Recycling Corp and the Association of Trade Waste Removers of Greater New York, Inc.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

The New York State Association of Criminal Defense Lawyers is the New York State affiliate of the National Association of Criminal Defense Lawyers. It is a

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

membership organization of more than 1,000 attorneys who practice law in the State of New York. Its members regularly practice in the Criminal Branch, Supreme Court, New York County and are subject to and have suffered under the practice complained of here.

In the view of the *Amici*, this case presents an issue crucial to the fair operation of the criminal justice system: namely, is it a violation of due process for one party to a criminal proceeding to select the judge who will hear the case. The *Amici* believe that any system that allows one party to make such a selection violates a key principle of due process, namely that "justice must satisfy the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955). Because the system under which Petitioners were tried permitted such a choice, the conviction violated the due process clause of the federal Constitution.

STATEMENT OF THE CASE

A system of random selection of judges is generally followed in the criminal courts of the State of New York. The Uniform Rules for New York State Trial Courts mandate, with limited exceptions, random assignment of judges to criminal matters. See 22 NYCRR §200.11(c). The 1986 Individual Assignment Plan establishes procedures for such random assignment, including special procedures for random assignment of judges to cases deemed complex. Every state court in the New York City area which hears felony cases has instituted procedures, albeit varying, providing for random assignment of judges, in all criminal cases. In addition, the United States District Courts for the Southern and Eastern Districts of New York also

randomly assign judges to criminal matters at arraignment.

The Uniform Rules allows the Chief Administrative Judge to make unspecified exceptions from the random selection system (see 22 NYCRR § 200.11(a)). Prior to 1995, the District Attorney of New York County (Manhattan), relying upon this loophole, had effected the assignment of cases by seeking out a certain few judges, believed by the criminal bar to be, with rare exception, strongly pro-prosecution, for the issuance of *ex parte* orders, such as eavesdropping orders, search warrants or certificates for out-of-state subpoenas. Thereupon, after having initially involved a specific judge in the matter under investigation, the District Attorney would request that the judge he had chosen for investigation purposes should then convene a grand jury and receive any indictment handed down by that grand jury. The judge would do so as a matter of course. That judge would then act as trial judge in the matter.

The result of this historical approach has been that the District Attorney has, by his manipulation of the selection of judges to preside over investigations and special grand juries, chosen the judge to preside over the indictments returned by those grand juries. Through the procedure noted above, prosecutors in New York County effectively selected a trial judge by making the unsupervised initial selection of a judge to sign a warrant or the selection, sometimes supervised and sometimes unsupervised, of a judge to preside over a grand jury.

There has been extensive professional criticism of this practice in recent years as well as litigation to halt the practice. [2]

At a previous time, responding to professional criticism of the system, the Administrative Judge issued a new policy relating to the selection of judges. In a Memorandum dated October 2, 1995, a new policy was established, as follows:

> 2) Any indictment returned by a Special Grand Jury convened after September 1,

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[2] The Appellate Division, First Department, refused to issue a writ of prohibition in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S. 428 (1st Dept. 1997), a case involving a pretrial effort to remove a judge selected by the system at issue, in which no conviction had yet occurred. In addition, in *New York Criminal Bar Association v. Newton*, 33 F.Supp.2d 289, 293 (S.D.N.Y. 1999), a federal court dismissed an action challenging the practice on the grounds that the criminal defendant party's (Coastal Oil) challenge was moot since a new judge was selected in the trial not applying the system. In addition, the court held that the bar association and individual lawyer plaintiffs had no standing to challenge the system, absent a real case in which the practice was applied. "The only specific injury that plaintiffs claim to have suffered concerns the assignment of Justice McLaughlin to Coastal's case; as noted above, that issue has become moot during the brief life of this litigation. Without any other specific instance of illegality alleged, there is no present case or controversy for this court to decide. . . . The associations and their individual members simply have not sustained any actual or threatened injury."

> 1995 must be scheduled for arraignment in the regular Grand Jury Part for the term. After arraignment, the case(s) will be assigned to a judge by the administrative judge.
>
> 3) Any indictment returned by a Special Grand Jury empanelled before September 1, 1995 will be assigned to the judge who supervised the Grand Jury. This assignment is for all purposes, including arraignment. However, the administrative judge may transfer the case for trial, or any other purpose, to any other judge.

This practice of the Manhattan District Attorney selecting the judge to empanel and supervise the grand jury and to receive any indictments and afterwards to try the case existed at the time that the indictment was returned in this case. See Affidavit of Juanita Bing Newton, dated June 16, 1997, par. 4, submitted in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept. 1997): ". . . the practice of the District Attorney selecting a judge to empanel and supervise a grand jury and to receive any indictments voted by such body was being *discontinued*" (emphasis added), showing that the practice existed prior to that date.

Whatever later modification occurred in the practice after 1995 did not effect the procedures in this case: there is no doubt that the District Attorney's Office selected Judge Leslie Crocker Snyder to sign the original warrants. She was then selected on November 9, 1994 to supervise the grand jury and pursuant to firmly established policy by the Administrative Judge for the criminal part as noted above, Judge Snyder was selected

to preside over the trial pursuant to her prior familiarity in this case.

REAONS FOR GRANTING THE WRIT

DUE PROCESS IS VIOLATED AND THE STRUCTURAL PROCESS OF A CRIMINAL TRIAL UNDERMINED IF ONE PARTY TO THE PROCEEDING IS ALLOWED TO SELECT THE TRIAL JUDGE

This case presents the direct question of whether the selection of a judge by one party to a criminal proceeding so undermines the appearance of justice that any conviction secured before a judge selected on that basis must be automatically reversed on due process grounds. Based on the analysis below, the answer must be that any such conviction cannot be upheld, since the selection of a judge by one party undermines the other party's confidence in the fairness of the proceeding and, as well, the public's sense of fair procedure. It constitutes "structural error," requiring automatic reversal.

Contrary to the normal rule of random selection that is the standard required by 22 NYCRR §200.11(c) of the Uniform Rules for the New York State Trial Courts and that virtually every court in this country follows, the district attorney's office in New York County selected the judge to sign search and wiretap warrants in this case, namely The Honorable Leslie Crocker Snyder. Thereafter, Judge Snyder was selected to supervise the special grand jury investigations into this matter. Then, as a matter of practice, routine and "history" as explained above, Judge Snyder was later assigned by the Administrative Judge of the Criminal Term of the Supreme Court for New York

County to preside at the trial. In this manner, the District Attorney's office in New York County, in effect, selected the judge.

This practice has received considerable attention and criticism from the organized bar. In May, 1998, the Criminal Advocacy Committee of the Association of the Bar of the City of New York issued a special report, "Report on the Assignment of Trial Judges," condemning this selection process: "The Association believes that this deviation from the rule of random selection that is embodied in the Uniform Rules is contrary to law and contravenes basic precepts that govern the fair and impartial administration of criminal justice." Trial Judges' Assignment Report at p. --. The Legal Aid Society wrote in a recent brief that the practice "damaged the administration of justice [and] ...produced a result egregiously at odds with the goals of the court rules and the impartial administration of justice." Brief submitted in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept. 1997). The Association of the Bar had previously noted that the practice creates, at the least, an improper appearance that "one litigant [the District Attorney] has an advantage over other litigants." The New York State Association of Criminal Defense Lawyers, has called the practice "an invidious evil [and] manifestly unfair" in its brief in the *Coastal Oil* case.

The recommendation of the Criminal Advocacy Committee of the Association of the Bar of the City of New York correctly describes the danger to the administration of justice created by the current situation:

> The Association of the Bar believes that the appearance of propriety in the administration of justice is an important issue. . . . The

> Association's position is that the public, all litigants and the members of the Judiciary themselves should know that the selection of judges to try particular cases is purely random, so it can never appear that one litigant has an advantage over other litigants.

Trial Judges' Assignment Report at p. --.

The *Amici* believe that such a practice violates two of the most important requirements of the due process clause of the federal Constitution: namely the requirement that a neutral and detached judge must preside over any criminal trial and the requirement that such a judge must be selected in a manner that satisfies the appearance of evenhanded justice. See e.g. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) and *Aetna Life insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986): "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" [citing *In re Murchison*, 349 U.S. 133, 136 (1955).

It is a basic principle of due process that any proceeding must be heard by an impartial judge. The selection of a judge by one party cannot satisfy the requirements of due process. This Court has noted in a series of cases:

> Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, and n. 2, (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a

> situation "'which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....'" *Ward* [*v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972)] at 60, (quoting *Tumey, supra*, 273 U.S., at 532).

Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 617-18 (1993)

Equally important, it must appear to the parties and to society at large that the selection of the adjudicator was accomplished by a fair process. Justice Kennedy noted in his concurring opinion in *Liteky v. United States*, 510 U.S. 540, 558 (1994): "One of the very objects of law is the impartiality of its judges in fact and *appearance*." (emphasis added). Justice Scalia explained further in his dissenting opinion in *J.E.B. v. Alabama*, 511 U.S. 127, 161 n. 3 (1994):

> Wise observers have long understood that the appearance of justice is as important as its reality. If a system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function . . . *In point of fact, that may be its greater value.* (emphasis added).

Similarly here, the appearance that one party selected the judge that heard the case would totally undermine the other party's "belief in that impartiality." More important it would undermine the public's confidence in the impartiality of the system.

The Louisiana Supreme Court, faced with an extremely similar procedure stated: "To meet due process requirements, . . capital and other felony cases must be allotted for trial . . . on a random or other rotating basis or under some other procedure . . . which does not vest the district attorney with power to choose the judge to whom a particular case is assigned." *State v. Simpson*, 551 So.2d 1303, 1304 (La. 1989).

The implication that there can be no due process violation unless the judge selected by one party actually makes a biased ruling is plainly incorrect. The Court below gave short shrift to this important issue. It stated in one sentence that: "The process by which the Trial Justice was assigned to preside complied with the applicable rules and was in no way prejudicial to defendants (see *Matter of Coastal Oil New York, Inc. v.* Newton, 231 A.D.2d 55 . . ." Pet. for Cert., App. 7. In the *Coastal Oil* case, the Court had noted: "There can be no due process violation without actual prejudice. Petitioners have suffered none. Their claims of prejudice are purely speculative. Nor do they even assert that any ruling made thus far by the presiding judge has been affected by bias." 231 A.D.2d at 57-58.

The "prejudice" prohibited by the due process clause cannot be restricted to an obviously biased ruling. It must include the "appearance" of partiality, as this Court has noted numerous times, since a party is prejudiced in having to submit to a trial before a judge selected in an patently partial manner which undermines the party's (and the public's) confidence in the fairness of the proceedings.

This Court has noted that there are certain trial errors which are so crucial to the fair administration of justice that the only remedy is automatic reversal.

> Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)).

Neder v. United States, 119 S.Ct. 1827, 1833 (1999).

The proposition that a "biased" trial judge so taints a proceeding that no further inquiry into actual prejudice is necessary has been accepted by this Court in many cases. See e.g. *Johnson v. United States*, 520 U.S. 461, 469 (1997).

The Tenth Circuit in its recent decision in *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000) suggested, erroneously we believe, that prosecutorial selection of a judge in that case was not the form of

"judicial bias" that falls into the "structural error/automatic reversal" category. In that case, the power of prosecutorial selection was "limited": prosecutors were apparently able to steer a superseding indictment only to one of a small group of judges to whom the original cases were already assigned. The court noted that "the alleged manipulation of the case assignment system will [not] recur in a large number of cases." 203 F.3d at 1265. Thus the error was placed in a "continuum" of trial errors, and the harmless error rule was applied. However, the fact that the prosecutors were able in any way to affect the selection of the judge should trigger the "structural error/ automatic reversal" rule.

In any event in this case, there was no limitation in the prosecutor's ability to select the judge. The Manhattan District Attorneys had the entire criminal term bench to choose from -- over 50 judges. Furthermore, the very fact that that the trial judge selected was one who presided over earlier proceedings in the case aggravated the possibility of prejudice.

First, such a system fosters the unseemly and disfavored practice of a judge determining the validity of his or her own ex parte orders, whether a search warrant, an eavesdropping warrant, a subpoena certificate, or another order. Such a system deprives a litigant of the neutral and detached magistrate to which he or she is constitutionally guaranteed. It defies logic to believe that any judge, no matter how well-intentioned, will not have some difficulty, conscious or subconscious, in finding that he or she erred in the issuance of an earlier ex parte order and to controvert that order. While a practice in which judges review warrants or other ex parte orders they have issued may be necessary in counties where there is only one judge sitting in criminal term, there is no justification

for it in a county in which, like New York, there are approximately 50 judges in Supreme Court hearing criminal cases.

Second, under such a system, the judge is almost invariably tainted by the receipt of ex parte information provided to him or her by the prosecutor, often without the defense being aware not only of the nature of the information, but even that the judge has received any ex parte information. The result is that the judge is making critical pre-trial and trial decisions with knowledge of, and perhaps based on, material unknown to the defense and not even in the trial court record and thus subject to review.

Further, a defendant who chooses to exercise his or her New York statutory right to a non-jury trial faces the possibility that the judge will be aware of, and affected by, inadmissible evidence, or worse, unverified and untested information which has, unknown to the defendant, been provided to the judge by the prosecutor during the investigative stage. While in some non-jury trials, the judge has prior to trial heard evidence inadmissible at trial (such as a confession which has been suppressed), the defendant who chooses to waive a jury is aware of the extent of the judge's knowledge and makes a knowing waiver. A lawyer is unlikely to counsel a client to seek a bench trial before a judge who has supervised the grand jury given the potential problems. This is especially unlikely when the judge has been chosen by his adversary. Effectively, therefore, the defendant is denied his statutory right to non-jury trial.

Third, there is a considerable danger that a judge who becomes involved in the investigative stage will lose his or her objectivity and become inextricably intertwined

with, and psychologically involved in, the prosecution. It is too much to expect a judge who has participated heavily in an investigation to later revert to the role of an independent, impartial and detached arbiter.

Fourth, there is the clear appearance of injustice in the heavy involvement of a judge in an investigation whose results he or she is called upon to adjudicate. A defendant accused of crime (and the legal profession and general public) can hardly expect a fair and independent determination by a judge asked to rule, for instance, over the propriety of the procedures of a grand jury he or she has supervised or the existence of probable cause for an eavesdropping warrant he or she has signed.

Fifth, such a system is at the very least susceptible to influence by one party to the litigation -- the District Attorney.

For these reasons, any practice of assigning indictments in cases to those judges who preside over the grand juries which return those indictments -- even if the judges were chosen independently without input or manipulation by the District Attorney -- has serious negative effects on the criminal justice system. These negative effects are far greater -- given the popular perception that the selection of judges in those cases is affected by the District Attorney. Many judges believe that the way to assignment to high-profile cases is a consistent record of pro-prosecution rulings. They believe that rulings for the defense -- even if they believe in their independent judgment called for -- might have an adverse effect on their own careers. New York State Supreme Court judges are elected and are therefore subject to public and political pressures. While the vast majority of judges, make efforts to apply the law in a just and

independent manner, a judge should never be faced with the pressure that a decision adverse to one party will affect the future assignment of cases to him or her and his or her career path. The harm of such a perception to an independent judiciary and a fair and impartial system of justice is great.

While investigative grand jury judges may have issued ex parte orders such as eavesdropping orders, search warrants, or the like, they have not read the grand jury minutes, have not heard any defense applications (except in very rare instances), and have not instructed the grand jury on the law. To the extent they do have familiarity with the matter it is based almost always solely on ex parte communications from one party to the eventual litigation - the District Attorney. Prior familiarity with the matter should, therefore, be a disqualification, not a qualification.

As the recent Association of the Bar of the City of New York Report notes:

> There is no merit to the claim that judicial economy and efficiency are properly served by assigning a complex case for trial to the judge who supervised the grand jury investigation that produced the indictment. A judge who approves the issuance of a search or eavesdropping warrant or who rules on the propriety of a grand jury subpoena is not necessarily capable of effectively managing a lengthy, multi-defendant trial involving complex issues of law and fact that may be entirely unrelated to the warrant issued, the electronic surveillance supervised or the subpoena litigation resolved. The experience, skill, acumen, patience and wisdom that a judge needs to preside

> over an indictment in a high profile, complex criminal prosecution does not necessarily depend on some limited familiarity with the preceding grand jury investigation. The random assignment of federal judges in complex multi-defendant criminal prosecutions in the Southern and Eastern Districts of New York has not adversely affected the ability of those courts to manage such cases effectively.

Criminal Advocacy Committee, "Report on the Assignment of Trial Judges," May, 1998 at pp. --.

The recommendation of the City Bar Association correctly describes the danger to the administration of justice created by the current situation:

> The Association of the Bar believes that the appearance of propriety in the administration of justice is an important issue. . . . The Association's position is that the public, all litigants and the members of the Judiciary themselves should know that the selection of judges to try particular cases is purely random, so it can never appear that one litigant has an advantage over other litigants.

Id. at ---.

CONCLUSION

For the reasons stated above, Petitioners' Petition for Certiorari should be granted.

Dated: New York, New York
June 27, 2000

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